UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. ANN L. AIKEN, JUDGE PRESIDING

UNITED STATES OF AMERICA, Government,	)	
v.	)	No. 06-60069 ✓ 06-60120
DARREN TODD THURSTON, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

TUESDAY, MAY 29, 2007

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PROCEEDINGS

TUESDAY, MAY 29, 2007

THE CLERK: This is the time set for Criminal 06-60069 and 06-60120, United States of America versus Darren Todd Thurston, imposition of sentence.

MR. FEINER: Good morning, Judge. Failure to appear was not one of my concerns in this case, but Mr. Thurston appears not to be here. Here he comes.

THE COURT: Good morning. Who is batting -- you are up.

MR. ENGDALL: Mr. Peifer is up this morning.

THE COURT: Go ahead.

MR. PEIFER: Yes, Your Honor.

Darren Thurston is before the court for sentencing today on one count of conspiracy out of the District of Oregon and one count of arson under § 844(f) out of the Eastern District of California.

Mr. Thurston, I believe, is 36 years old today -- at this time. Since 1990, at age 20, he's been in the forefront of the radical animal rights movement, both in Canada and in the United States. That association over the years has involved both lawful and unlawful activity, and eventually it brought him virtual stardom among the extreme activist community in that field.

He began in 1990 with simple acts of the graffiti

and damaging billboards, doing the type of things that many people in this case did when they first started out, relatively minor offenses.

In 1991, he began to direct his attention to the facilities -- research facilities at the University of Alberta, and eventually there would be crimes committed there.

In December 1991, he burned three trucks at a fish company. He used the ALF publications on timing devices to help him do that. He was caught inadvertently attempting to reprint a how-to book, booklet on arson, and the printer turned him in to the police, and that's how he was caught.

In June 1992, Thurston and his cohort, David Barbarash, who is another major figure in animal rights activities in Canada, they targeted a research station at the University of Alberta, they burglarized it, and they stole 29 cats. Thurston ended up pleading guilty to that offense, plus the 1991 truck arson.

I should note at this time that Mr. Thurston has no criminal history points because those -- even though he has these prior felony convictions in Canada, because of the age of the convictions and the nature of his sentence, they don't count on the -- they don't score any criminal history points.

In 1994, when he was on release pending appeal, he

went to California, illegally, of course, and he did that for an EarthFirst! gathering. There he met Jonathan Paul and Kevin Tubbs, two of the members of the conspiracy in this case. So his association with them goes back at least to 1994.

In 1996, he met Jonathan Paul again at an antifur protest in Seattle, and also he began at that time an association with Gina Lynn, who is an animal rights extremist here in the United States.

Later in 1996, he stopped off in Eugene for a visit with coconspirator Tubbs. At that time, of course, there was no conspiracy, but again, it shows their early association together. He reconnoitered or performed reconnaissance at fur farms in Oregon, Washington, and California, I believe it is, and he did that with Gina Lynn.

Also in 1996, he completed the first edition of the book, *The Final Nail, Destroying the Fur Industry, a Guided Tour*. This required, by his own admission, over 500 hours of research, and it was a virtual bible for the antifur movement in the United States and Canada. It was a comprehensive listing of fur farms in the United States and Canada.

And a number of those fur farms, over the years, were hit by vandals and those engaged in the release of the animals.

The Final Nail, authored by Mr. Thurston, instructed on the use of incendiary devices. It was posted on the Internet so it could be widely circulated and widely used. He also produced a second edition of *The Final Nail*, which had added 40 or 50 more farms in the U.S. and Canada.

And also at that time, he added more discussion on incendiary devices, and those contributions came from Joseph Dibee, obviously a coconspirator in this case.

In 1996 through 1997, Mr. Thurston and Gina Lynn targeted BioDevices Medical Research Lab in Orange, California. They surveilled that location two or three times. They ended up not -- Mr. Thurston ended up not being involved in the actual crimes there, because at that time he was in Canada, back in Canada on his case there. But it was, of course, hit by others, thanks to the planning of Mr. Thurston and Ms. Lynn.

In 1997, again, he was illegally in the United States. He planned or attempted attacks on a taxidermy facility in Southern California and a meat company in San Diego. And in connection with the meat company, they were planning to use incendiary devices to cause a fire there, but the plan had to be aborted when a homeless person spotted them and they became aware of that and decided not to commit that crime.

In February 1998, he was arrested in California

and he was subject to removal to Canada.

From 1995 through 2001, Thurston was the ALF's primary publicist and spokesman, operating primarily out of Canada doing that. By his own admission, he posted anywhere from 100 to 200 communiques of various actions, many of them unlawful, which were publicized -- well, actually, they came from all over the world and, of course, were publicized all over the world.

And the court knows from the earlier sentencings in this case and the overall nature of the case that publicity was very important to this particular conspiracy, and publicity is very important to those who engage in similar offenses.

Up until his arrest in 2005, Thurston hosted Web sites that taught on the Internet about Internet security and anonymity. He also shared with Dibee, Rebecca Rubin, and Tubbs, and others, the use of dead drops, a term that the court's heard already, sharing of unsent e-mail messages as a means of security.

He authored *The ALF Primer, A Guide to Direct Action and the Animal Liberation Front,* and that publication was also posted on the Internet.

He assisted with the reformatting and the posting on the Internet of the publication *Arson Around With Auntie ALF: Your Guide For Putting the Heat on Animal Abusers*

Everywhere, which also was a how-to book, as you can tell from the title, on how to commit arson.

He did the same in order to facilitate wire distribution of William Rodgers' book, *Setting Fires With Electrical Timers, an Earth Liberation Front Guide.* That was released on the Internet just after the arsons at Jefferson Poplar Farm and the University of Washington, and that was no coincidence, the fact that that came out at the same time as those arsons; added further incentive to the people to commit similar -- similar crimes. And that was what was encouraged by the publication itself.

Thurston, for the Animal Liberation Front, worked in conjunction with Craig Rosebraugh, who was the publicist or spokesman for the Earth Liberation Front. They would share information regarding arsons. They did that, for example, in connection with the U.S. Forest Industries arson that occurred in Medford in 1998. As a result of a search warrant of Rosebraugh's computer, the communications were discovered between Thurston and Rosebraugh regarding the U.S. Forest Industries arson.

Also they worked together, Thurston and Rosebraugh did, spent hours, according to Mr. Thurston, finalizing the media release for the Vail arson. The media release, of course, was based on the communique that had been authored by Chelsea Gerlach, and that media release did go out

because of Mr. Thurston and Rosebraugh.

Also, Thurston mediated the dispute over the Jefferson Poplar Farm communique that the court heard about last week. That was a situation in which Rosebraugh was basically called on the carpet by Gerlach and others for changing the wording of the communique. Thurston was important enough that he could be in Vancouver, British Columbia, and have Rosebraugh come to him to be dealt with, and Ms. Gerlach, of course, she came up there as well. And this, again, shows the significance of his role.

And that was the first time, as the court knows, that he met Ms. Gerlach, and they continued their association after that.

When Rosebraugh quit the ELF spokesman position, it was Thurston who went out and found a Canadian to take over that position.

Now, in the summer of 2001, there was concern that Daniel McGowan talked too much, and it was Darren Thurston who essentially lectured him on why that wasn't a good idea. Why he needed to keep things to himself.

In October of 2001, we have the crime that occurred that he's being sentenced for, the arson at the BLM wild horse facility in -- near Litchfield, which is actually near Susanville, California. That fire resulted in damages to the BLM facility in the amount of $122,497.60, so that's

an accurate figure that's reported in the presentence report.

The other people involved in that arson were Meyerhoff, Dibee, Kolar, Tubbs, and Rubin. Thurston had received e-mails from Dibee and his fellow Canadian, Rebecca Rubin, regarding an upcoming action to be held in the United States without really specifying what it was. Thurston was interested because he understood that Ms. Gerlach would be there and he wanted to meet with her again. As it turned out, Ms. Gerlach was not involved in the arson at Susanville.

Thurston and Rubin, of course, being Canadians, had to cross over the border, and they did that illegally, of course, and they went across at a point where they could not be noticed in the wilderness there. They were picked up by Jennifer Kolar, taken to Dibee's house in the Seattle area, and it was there that Thurston learned the nature of the crime. And he particularly asked to be part of the horse release. It was a combination horse release and arson, but he wanted to be involved with releasing the horses.

He did help with preparations for the crime, working with the equipment, making sure there were no fingerprints. And they received their maps from Ms. Kolar, clean maps, so there were no fingerprints on those. They

left Seattle, and they picked up Tubbs in Eugene and then went down to California.

Thurston's role was essentially to cut through the fences and get to the horses to try to funnel them out of the corral into the rangeland there. He wasn't able to do that effectively, however. They couldn't -- he couldn't seem to get them to leave the corral.

The arson itself was committed by other people, as the court knows from earlier descriptions of that crime. Certainly Mr. Thurston aided and abetted throughout the crime, however.

The communique in this case was directed against the government. Made it very clear that BLM, of course, physically was the target, and it was the target of the plan, itself, to -- it was calculated to retaliate against BLM, to coerce it, and intimidate it from any further action regarding the capture and corralling of wild horses.

The communique condemned BLM for, quote, rounding up thousands of wild horses and burros to clear public land for grazing cattle. Many of these wild animals are sent to slaughter. And then it warned of future action. Quote, we will continue to target industries and organizations of this nature. That was in October of 2001.

From 2001 through his arrest on December 7th of 2005, in Portland, Thurston was personally involved,

romantically, and also engaged in criminal activity with Chelsea Gerlach. They did commit numerous crimes together in the interim period. They supported themselves selling a variety of drugs, Ecstasy, LSD, and marijuana.

Thurston, of course, was an illegal alien, a criminal alien because of his prior felony convictions, living in the United States, periodically crossing the border back into Canada and illegally entering the United States again. This went on from 2002 to 2005. And these border crossings, of course, were in very remote areas and involved quite a bit of effort to cross the border without being noticed. He traveled with Ms. Gerlach. Before they lived in Portland, they lived in San Francisco for a while, rented property there, an apartment, under a false name.

By his own admission, he and she went to New York and New Jersey to perform reconnaissance at sites owned by the Monsanto Corporation, a bioengineering firm, and possible attacks. There's no indication that they engaged in any actual attacks, but their purpose was to reconnoiter those sites.

He did move to Portland with Ms. Gerlach in 2003, where he lived until their arrest on the same day. Thurston went by the name Ian Holladay, but he had other identification in another name, a true living Canadian, whose name he was carrying on a phony green card, as well as

a Canadian identification card, the equivalent of a Social Security card in the United States.

He also had received identity cards from Kevin Tubbs. The court will recall that Mr. Tubbs would take those when they were left by mistake at the store where he worked, and then he would collect them himself, and he delivered some of those to Mr. Thurston. And Mr. Thurston made purchases with stolen credit card numbers. I think in particular he bought a computer with a stolen credit card number.

In 2003, he and Ms. Gerlach performed reconnaissance of a predator research station in Utah and facilities at Utah State University and Logan State University. In 2003, they dug up a cache of firearms, the court knows that they were buried in rural Lane County, and then reburied those at the coast.

Thurston and Gerlach went to a gun show in Las Vegas where she purchased two firearms for him since he couldn't purchase firearms because of his status as a convicted felon and illegal alien, plus purchased ammunition, cannon fuse, and books on detonators and incendiary devices. Those were the items that were pointed out by Ms. Gerlach in the Siuslaw National Forest and were dug up and are in the government's possession at this time. Mr. Thurston is agreeing to forfeit those firearms or

abandon those firearms to the government as part of his plea agreement.

Mr. Thurston worked with a representative of Mexico's Zapatista guerrillas in Redway, California. He demonstrated the explosive HMTD, an explosive that he actually manufactured, that Mr. Thurston manufactured in Portland. And they tested it there in Redway, California by blowing up a stump for the benefit of the representative of the guerrillas.

Your Honor, the sentence recommendation by the government in this case is the lowest of all the ten defendants before the court. 37 months. Mr. -- I think it was Weinerman last week referred to the Bell Curve, and Mr. Thurston, by virtue of his participation in only one arson and his relatively minor participation in that arson is at the bottom of the Bell Curve, so we are requesting 37 months. Of course, that's because also there should be a substantial reduction for his -- not just for his acceptance of responsibility, but his continued cooperation, substantial cooperation with authorities in the investigation and prosecution of this case and providing information about a whole array of activities that I have discussed just now and providing information on other people.

We have done our best, Your Honor, as you know, to

present to the court ten proposed sentences, proportionate sentences, and he is -- he fits within the very bottom of that list of proportionate sentences.

The reason we are asking for the -- the minimal role in this case is that he was in it essentially for the horse release, not for the arson. There's no doubt he aided and abetted the arson. He was there to meet Ms. Gerlach, who turned out not to be there. And that was apparently the reason he crossed the border to begin with. And of the six participants in the arson, there's no doubt that he did the least in terms of the arson itself.

We are seeking -- in order to be consistent in all these cases, and this case is a good example of one, we are seeking the terrorism enhancement under the guidelines. It factually meets the requirements of the guidelines as far as being calculated to retaliate against the government and coerce and intimidate the government, specifically BLM, in reference to the wild horse program.

The only question is whether, and Mr. Feiner I'm sure will have quite a bit to say about this as well, and the court has addressed it in your opinion, the only question is whether the change in law that occurred several days later with the Patriot Act should work to his benefit, and I just have a few remarks about why that should not work to his benefit in this case and, in fact, would be an

exception to the plea agreement.

The basic problem with -- there are two problems with his argument. The first is that the plea agreement, and it's the same for all the defendants, specifies what guideline manual applies for calculation purposes.

That was an agreement of all the parties, and a conspiracy has occurred in this case, not just with Mr. Thurston, but all the defendants, that involved crimes that occurred from 1996 through 2001.

It was essential, in order to make the plea agreement essentially work and be meaningful for all the parties that one book be agreed on. And that's why the -- the sentencing guidelines that went into effect on November the 1st, 2000, were chosen.

And the court knows that generally speaking, there is a one book rule, that when you choose a book, you stay with that book. There could have been books in this case from any of the other years as well, but they were all -- everybody agreed that the 2000 guideline manual would be the one applicable.

According to the plea agreement, and this is the exact language, guidelines calculations should be derived from -- the parties agree, guideline calculations should be derived from the United States Sentencing Commission Guidelines Manual with effective date of November 1, 2000.

In other words, that when the court is looking at the calculation in the guidelines, that that book and that book alone is controlling.

Now, of course, in Mr. Thurston's case, that is the guideline book that is applicable or would be applicable even without an agreement, because his crime occurred after November 1 2000, namely in October of 2001. Essentially what this agreement does is freeze the state of the law in effect at that time on that date and makes that guideline manual alone applicable.

Now, as the court noted in your opinion, we are actually dealing with the change in a statute here, a statute that's referenced in the guideline, but the actual terms of the statute are not -- not set out in the guideline, but the statute itself is the controlling factor for purposes of defining a federal crime of terrorism.

The fact that that statute changed should have no effect on this defendant, no benefit to him. That change occurred, of course, after the date of the crime. The crime was complete on October 15th of 2001.

As the court notes in the opinion on Page 32, the defendant should not be entitled to benefit -- defendants generally are not entitled to benefit from future statutory changes. Now, that's true in general. It should be even truer in a case like this where they -- all the parties have

agreed to what is applicable to their case so that the plea agreement and the existing statute in effect on October 15th, 2001, essentially froze the law in effect at that time and on that date, and that's what should be applicable to Mr. Thurston. Otherwise, he would -- he would basically have a windfall from a future -- a future statutory change that didn't apply to him.

The court asks in the opinion whether the rule of lenity applies. Well, the rule of lenity only applies if a question is truly ambiguous, and we submit that it's not ambiguous here. That on October 15th, 2001, only one guideline book and only one definition of federal crime of terrorism existed. And there's simply nothing ambiguous.

I imagine Mr. Feiner will say, well, the guideline book says that when you have two overlapping crimes, then you use the more recent guideline manual. Well, that was the whole purpose of the agreement, was to prevent that type of two book approach and to limit it to just one book, namely, the book that I have here with the blue cover that was in effect on the date of the crime.

Your Honor, the government's sentencing recommendation is 37 months, and we ask the court to achieve that sentence as follows: With the application of the -- excuse me -- the base offense level, of course, is 20. And then we ask for a 12-level increase for the terrorism

enhancement. If the court disagrees with our analysis under § 3A1.4, we ask that the court nonetheless depart upward, as has been done in other sentencings in this series of cases, in order to reach the same result through the court's general discretionary authority to depart upward, because, as the court has explained in the other sentencings, the purpose of the activity here was the same as that covered in a meaningful way by the enhancement under the guidelines.

That leads to Criminal History Category VI and an Offense Level 38. We ask the court to depart -- not depart downward. This is actually a -- not a departure itself, but simply an adjustment, an adjustment downward four levels for minimal participant, as I have explained, which leads to Level 34. Then three levels for acceptance of responsibility takes it down to Level 31, Criminal History Category VI.

Then we are asking for a substantial assistance downward departure no greater than 17 levels. The purpose of that is to get the defendant down to Level 14, Criminal History Category VI, which would be a range of 37 to 46 months.

THE COURT: I think you need to go back to your calculations because I don't think I see what you are doing. And I'd like you to --

(The court conferred with the law clerk.)

THE COURT: Yeah. And -- I know.

You are in conflict with the PSR, so I just want you to highlight for me why --

MR. PEIFER: Well, the PSR doesn't recommend minimal, it recommends minor role.

THE COURT: No. It's more than that.

MR. PEIFER: So it's a two-level difference there.

THE COURT: So walk through it. It's a base level offense of 20.

MR. PEIFER: Right.

THE COURT: You add 12 levels for your requested terrorism enhancement or the alternative theory, which then is 32. There is an judgment for role --

MR. PEIFER: I'm sorry. 32. Right.

THE COURT: 32. You said 38. So that's -- I just want you to go back and do your calculations on the record.

MR. PEIFER: Right, Your Honor.

You take off four for minimal participant, so that's 28, and then three for acceptance of responsibility, 25.

And then, Your Honor, at that point, the range is 110 to 137. So then we go down as far as necessary to get to 37 months, which is 11 -- I'm sorry -- 11 levels down.

We -- in each one of these cases, as you have noticed, I'm sure, so far, we have built in enough leeway so

that there could be a greater departure, if necessary, to get down to the recommended sentence, so.

THE COURT: I just wanted to make sure I had the calculations on the record.

MR. PEIFER: I apologize for that. I had some numbers wrong. So that's an 11-level downward departure to 37 to 46.

Your Honor, I think Mr. Feiner has been very helpful, and the other attorneys too, for that matter, in noting the fairness and reasonableness of the government's recommendations in these cases and the fairness of the plea agreement, even though they are free to argue for less. We submit that 37 months is -- is a fair, reasonable sentence under all the circumstances for the type of participation that Mr. Thurston engaged in in this case.

Now, the court, I recognize, and respectfully, has disagreed with us on the other three defendants and reduced it a little farther in their cases for a number of reasons, but we submit this is not one which should merit any further reduction. 37 is sort of a rock-bottom sentence for this type of activity.

And before I finish, I just want to make one other point.

THE COURT: What I'm actually going to tell the defendant shortly is he's lucky I'm not going to go up. I'm

free to go up or down, and he's very lucky, given the nature and circumstances of the plea agreement, my attempt to honor those plea agreements, that I'm not going to go up.

MR. PEIFER: I just wanted to say one thing. This case, of course, is out of the Eastern District of California. The government conferred very closely with prosecutors on this case in Sacramento, the Sacramento office of the U.S. Attorney's Office. Particularly, the prosecutor we were dealing with almost exclusively was the prosecutor in the Unibomber case. He prosecuted Ted Kaczynski. He's very familiar with various types of terrorism from the most extreme down. And he -- he agreed that in a case like this with someone cooperating as extensively as Mr. Thurston did, being as limited as he was in his involvement in the overall conspiracy, that he agreed that 37 months was -- or is the appropriate sentence from their standpoint.

Thank you.

THE COURT: Mr. Purdue, do you just want to explain the difference? They have reached a four for planning, role adjustment. Do you just want to tell me why you have a two?

MR. PURDUE: I just felt, Your Honor, that just his involvement from the time he began and the activities that they were involved in, it just -- I didn't feel like he

was more or else culpable than all other defendants, and that was the difference.

THE COURT: Thank you. Anything else?

MR. PEIFER: That's all.

THE COURT: Mr. Feiner.

MR. FEINER: Thank you, Your Honor.

At the outset, I have a number of nuts and bolts issues that I just want to go over and make -- number one, make sure I understand, and then a couple of issues related to the language in the PSR.

The first, I didn't raise it at the outset here, but I have been working under the assumption that the court made a ruling on the second day of the Meyerhoff case when I wasn't here that 1B1.8 applies to all the defendants in this case; is that correct?

THE COURT: I have applied it that way.

MR. FEINER: Okay. I just wanted to make sure since I had not separately filed anything.

Secondly, I'm referring to the presentence report now. There's a paragraph in there which I objected to by sending a dismissal notice and an e-mail to Mr. Purdue, and I would like to ask the court to consider asking that that paragraph either be removed or substantially amended from the report. And I have mentioned this to Mr. Purdue this morning. I'm referring to Paragraph 57a.

That paragraph concerns a protest that occurred in October of 1990 that my client was party to. Subsequent, or in the course of that protest, he was stopped for jaywalking. A weapon was found in his possession. He was charged. The case sat because of identity issues and also lack of law enforcement contact with Mr. Thurston until this case came up, and then he was connected back to the name Darrell Thorton, and that case was rediscovered. It was ultimately dismissed by the Multnomah County District Attorney's Office.

What concerns me about this is that the paragraph in here, first of all, is outside my normal experience with presentence reports regarding dismissed, unconvicted conduct, in that it has a considerable amount of information rather than an identification of the charge and a dismissal.

More significantly, what bothers me about it is that it certainly creates an inference that my client was involved in the White Aryan Resistance Movement, and that that's why he was at the courthouse protesting Mr. Metzger. That cannot be further from the truth. My concern about that being in there is we heard from Mr. Cox, the BOP representative, what the BOP does when they perceive someone is a member of a disruptive group.

My client is not a member of any Aryan organization, any white supremacist organization. What he

was doing at the Metzger trial, in fact, was appearing there as a member of a group called The Skinheads Against Racial Prejudice. And they were largely persons involved in the music culture who were opposed to Mr. Metzger and the skinheads who are the White Aryan Resistance skinheads. And they came there just to be a counter-presence.

I'm not trying to justify what Mr. Thurston did in terms of using a false name, in terms of carrying a weapon, but this could be extremely misleading, and we would just ask the court to consider either asking that it be amended or just have the text of the crime deleted from it.

THE COURT: I have modified presentence reports in earlier cases because not only Ms. Wood raised these issues in open court, but also did a follow-up letter because she had issues with regard to the specificity and lack of corroboration on some of those items, and as a result, Mr. Purdue went back and reviewed his PSR.

In addition, Mr. Tubbs' letter was filed late by Mr. Friedman. I asked Mr. Purdue to go and, in the normal course of his review, address those issues.

I believe those have all been addressed, correct?

MR. PURDUE: Just on the Meyerhoff case.

THE COURT: Mr. Meyerhoff is done. So Tubbs is in the works. We'll take that under advisement. I don't have any difficulty eliminating the additional language and just

noting that there was -- it's been dismissed. I think that's a fair statement with regard to how we have handled other matters addressed in any number of presentence reports that have been filed.

It is additional information, and it would have the potential, I think, of blocking his placement in a less secure facility and increasing his risk severity count, perhaps unnecessarily.

MR. FEINER: I appreciate it.

Also, just -- and I have already mentioned this to Mr. Purdue, but the restitution figure was corrected in Paragraph 83. There are two references in Paragraph 30 and in Paragraph 40 which uses the old figure. Insignificant, but --

THE COURT: No. But those are -- we try to do -- do it correctly, and if we can make those modifications, there's no reason we can't do that.

MR. FEINER: And then finally, the last paragraph that we -- this was not part of my objection letter. In all honesty, I didn't notice it until I was talking to my client about it yesterday, so if it can't be done, I accept responsibility for that, but I would at least like to point it out to the court, if it can't otherwise be adjusted, and that is Paragraph 29 has a second sentence that says, "They traveled to Seattle, Washington, and met with Mr. Meyerhoff

and planned the arson at the BLM horse facility." I think even just by the government's presentation this morning, it's clear my client did participate in the planning of the action, but throughout the course of this particular incident and the planning of it, he absented himself from planning of the arson. And I note from my conversations with Mr. Purdue, he regards arson and actions as sort of interchangeable, and I'm thinking that that may be why it's in there in this way. But if it is possible to amend that, we would also appreciate it.

THE COURT: I don't think -- you don't have any objection to that?

MR. PEIFER: No.

THE COURT: That comports with your what analysis is and your sentencing statement?

MR. PEIFER: Exactly.

THE COURT: Mr. Purdue, would you make that modification as well?

MR. PURDUE: I will, Your Honor.

MR. FEINER: All right. The next subject that I'd like to talk about would be the terrorism enhancement issue.

First, I'd -- I'd like to focus for a second on Mr. Peifer's discussion of the plea agreement, how it got to be where it was and whether or not, as he says, there was anything in that agreement that bound us to a particular

state of the November 1st, 2000, sentencing guideline book.

First of all, it's my understanding that the reason we ended up dealing with the 2000 book, and I could be wrong on this, I was told this by another one of the defense counsel, was because, for some of the defendants, there was a concern that the amendment to 3A1.4 that came along later authorizing the upward departure for acts which would not be considered crimes of terrorism might create an ex post facto situation. So there was a determination by the government, prior to my ever participating in any plea negotiations, that the 2000 book would be used.

I recall, during the course of that discussion, suggesting that, as far as my client went, we were not concerned about ex post facto application of that particular section, and we were prepared to proceed as the guidelines -- with the book that's in force at the time of sentencing. Basically, I was told that we were going to be using one book for all the defendants and that we would be accepting the 2000 book if we were going to negotiate, which we did.

And I point that out because later on in this presentation, I will refer to how plea agreements are to be construed specifically because of the fact that the government's in control of those plea agreements.

I also think it's fair to say that at the time

that we all agreed to those plea agreements, none of us understood the consequence of the Patriot Act amendments to 3A1.4. From subsequent conversations that I have had with Mr. Engdall, I feel comfortable saying that we were all kind of in the dark at the time as to the fact that there had been an amendment that might change the appearance of the terrorism enhancement.

When Mr. Peifer says there was an agreement that we use one book, and I believe I heard him say that, perhaps what I'm arguing is in one way or another, in contravention to the plea agreement, that really can't be further from the truth.

As I mentioned during the terrorism enhancement discussions that we had, we accept the 2000 book. That simply is not an issue. And the book as it existed on November 1st is the book as it existed on October October 30th of 2000.

What changed was the statute, which was adopted and incorporated by reference into the book. We didn't agree that we would accept the October 2000 book as it existed on October 15th or as it existed on October 30th. We just said that we would accept that book. And we have accepted that book. If you look at that plea agreement, including the language that Mr. Peifer read, there is no attempt to limit it to the book as it existed on the day it

was drafted or on the day that it expired. It's simply left as an undiscussed, unagreed upon issue because none of us knew that there was an issue there at the time.

So in essence, what's going on at this point is backing and filling and trying to make sense out of what we agreed to, not knowing it was there.

In doing some extra research based on the court's opinion, I, over the weekend, reflected on the sentencings that you have held for the prior three defendants in this case, and a little light went off in my head, something that I hadn't thought of in any of the prior briefings or arguments but I think actually is a controlling factor in this particular issue. And that is the fact that at the beginning of each sentence you pronounced so far in this case, you have begun by grouping the offenses. You have grouped the conspiracy and all the substantive offenses involved in the case, calculated them out into the guidelines, and given a solid or a single sentence to each of the defendants.

And in fact, in Mr. Thurston's case, the presentence report, and I'm sure the government and Your Honor will look at it the same way, is substantive crime of arson is going to be grouped with his conspiracy count.

So I understand that the court, in your opinion, was not ready to accept the concept of the one book rule of

1B1.11, taking a crime that was before an amendment to the guidelines or a revision, I think is the term that they used, and saying that the conspiracy came after the revision and the arson came before the revision, and therefore, as that section provides, it would -- you would use the later date.

But the fact is, prior to there ever being that rule, the common procedure under the guidelines was that when counts were grouped for purposes of determining a guidelines sentence, the date of the last grouped crime would be controlling. And if there had been a change to the guidelines in the intervening period, as long as the ex post facto rule didn't provide otherwise and require that you go back to the earlier date, and I would remark that it does not in this case, we have no ex post facto issues that we are arguing, that the last of a series of crimes that was grouped would be the one that controlled which version or book of the guidelines was utilized.

And I have a Fifth Circuit case that I provided to the court and the prosecutors this morning that I would just like to point out some language from.

Okay. So the case -- whoops. The case is *United States v. Kimler*, 167 F.3d 889. That's a Fifth Circuit case from 1999. And in the course of the *Kimler* opinion on -- I can hardly see this. It looks like it's Page 894. The

court there talked about the fact that this use of the last day of the last incident of the grouping became controlling, and they said that a number of other courts had previously ruled that way. They cited a case called *Bailey*, which was out of the Eleventh Circuit.

And I'd just like to highlight the portion of the opinion dealing with that. And it said, and this is referring to the *Bailey* court:

> "The court reasoned that the one book rule, together with the guidelines grouping rules and relevant conduct, provide that related offenses committed in a series shall be sentenced together under the sentencing guidelines manual in effect at the end of the series. Thus, a defendant knows, when he continues to commit related crimes, that he risks sentencing for all of his offenses under the latest amended sentencing guidelines manual. Analogous to a continuous criminal offense, like conspiracy, the one book rule provides notice that otherwise discrete criminal acts will be sentenced together under the guidelines in effect at the time of the last of those acts."

So that's exactly the situation that we have got here.

Secondly, then, in the holding on the *Kimler* case, which is on Page 895, the court indicates that it agrees with *Bailey* and other courts that have faced the issue, and then goes on to say, "Application of the revised guidelines thus does not violate the ex post facto clause."

So this court actually is even saying that if the amendment that occurs or the change that occurs works to the detriment of the defendant, the ex post facto clause is superseded by this analysis. The Ninth Circuit, and I will just provide the cite for that, has said that that isn't the case in an ex post facto situation.

But in this case, because *Kimler* was sentenced under the sentencing scheme in place when he committed the counterfeiting offense, the last offense in the series of grouped offenses, he was on notice that the revised guidelines would apply to his mail fraud counts as well.

So the Ninth Circuit takes up something related to this in *United States v. Orltand*, which is 109 F.3d 539, in 1997. And I just point that out because in that, they decline to follow the previously set -- or the opinion in cases like *Kimler*, but it wasn't based on anything that I'm asking the court to pay attention to here today. It was based solely on the fact that the Ninth Circuit believed that if, in a course of a series of grouped cases, there was a change in the guidelines that created an ex post facto

situation, that in fact, that last offense that was affected by the ex post facto change had to be sentenced differently than the other grouped offenses.

So I would suggest to the court that we have got a situation which is entirely consistent with the *Kimler* case and the cases cited in *Kimler*, and that under the grouping rules, the conspiracy case, which concluded on October 30th, is the last in the series of two offenses that were grouped here, and that the guidelines as they existed, the 2000 book but with the amendment to the Patriot Act that the court's already ruled applies to the conspiracy case, should be the one that is utilized and that the terrorism enhancement should not be applied to Mr. Thurston.

I also -- I will do this one briefly because I think it's really a secondary argument at this point to the grouping issue, and that is asking the court to reconsider the revision of the guidelines portion of 1B1.11. And the reason for that is if you look at the language in 3A1.4, it makes it very clear that what they are doing is adopting and incorporating by reference the text of 2332b, the Definitions section.

The sentencing commission, when they drafted the guidelines, could have put a definition into 3A1.4, but instead of doing that, they just referred to the language in 2332b and said, we adopt that.

Congress has the ability to amend the guidelines to protect that. One example that comes to mind where the change in the guidelines, the amendment was actually initiated by Congress, not the sentencing commission, and what the sentencing commission did, or the guidelines commission in 3A1.4, is basically outsourced to Congress the ability to change the definition of what is a federal crime of terrorism for guidelines purposes simply by redefining what it was, or 2332b. So although it is not actually a guidelines revision in the terms of a new book of the guidelines coming out, it, in fact, occupies the same position of being a change in the text of the guidelines.

Mr. Peifer talked about the one book rule and how that's what, you know, we are all instructed to follow. I would point out to the court that, really, the one book rule is what's going to suffer most if a different definition of federal crime of terrorism is applied to the arson case and as opposed to the conspiracy case. The one book rule, the intent of that is that with one defendant, he should be sentenced using just a single book of the guidelines. And the court's already ruled that the conspiracy charge is to be sentenced under the guidelines as they existed after the amendment. And I would suggest that the one book rule, as it is stated in 1B1.11 in the language which refers to the later crime drawing up the earlier crime, in fact, would be

enforced and complied with here were the court to analogize, at the very least, the change in the definition of 2332b to an amendment to the sentencing guidelines.

I know that you mentioned in your opinion, there was some discussion of the savings clause, and Mr. Peifer, I believe, also just mentioned the idea that a criminal defendant shouldn't benefit from a change in the statute.

Well, first of all, I'd point out that that happens all the time in the guidelines. There are detriments and benefits occurring because a person normally is sentenced under the -- the instruction of the commission, is to be sentenced under the book in effect at the time of sentencing, and it's not uncommon that there's some benefit that accrues between the commission of the crime and the sentencing of a defendant. The only time we don't follow that is if there is a detriment, which is what's prohibited.

And then in terms of the -- just confirming the court's -- both the bringing up the savings clause and then saying -- mentioning that we are not really dealing with an exact situation involving savings clauses here because criminal liability isn't conferred by 2332b in this case, the *Harris* case, which was cited earlier by the government, yeah, during the earlier arguments, and this is the case where the person threw the firebomb in through the municipal building where his -- I believe his father had been held by

the police, this just points out, number one, that the definition of federal crime of terrorism is imported into the guidelines from 2332b, and it says, just the first line of it, "The sentencing guidelines do not predicate an upward adjustment on a violation of 2332b."

And the reason this came about in the *Harris* case was that Harris was saying, hold it. This isn't just a definition we are referring to. You have got to look at it in the context of all of 2332b, and we require conduct which -- we should require conduct which transcends national boundaries to be involved. The court disposed of that rather quickly and said, no, this isn't -- the reference back to 2332b is not one that deals with the conferring of liability. It is merely used for definitional purposes.

So I would suggest that the -- if we are going to make any analogies here, the analogy to an amendment to the guidelines is much more accurate and much more in keeping with the stated purpose and intent of the one book rule than any type of analogy that would consider this one that would be affected by the savings clause.

I actually don't think there's necessarily an ambiguity left after this. I believe that this evaluation would resolve the issue. But if at this point the court is still not feeling like the issue is resolved in one way or another, clearly, I would suggest that this really is a

situation for the rule of lenity because there is an ambiguity. It's something that the guidelines -- the sentencing commission and the drafters of the guidelines don't seem to have ever contemplated would exist, and it's facing us now. As far as I can tell, this is the first time this particular issue has ever come up. Be it operation of the rule of lenity or be it just an operation of what is a reasonable sentence and a reasonable interpretation of the guidelines here, it would be our position that ruling in favor of the defendant on this particular issue is reasonable and is in keeping with all the intention expressed in the guidelines.

Finally, I would like to, then, move to my client and his sentencing at this time on this case. We have not seen a picture of where this event occurred, and before I start, I would like to just provide the court with a visual image of where this Litchfield corral is.

Okay. This is a big picture of the desert, and if I can find the right tool, here, for placement purposes, is the Litchfield corral that was the subject of this arson.

From a more close perspective, this building right here is the hay barn that actually was set afire. You can still see some of the hay underneath the roof. This is a replacement, by the way. This was not the building as it existed at the time of the fire.

And these fences over here are similar to the fences that my client was preoccupied during the course of this offense.

Mr. Thurston has lagged behind a number of the other defendants or most of the other defendants in this case in the sense that he was initially arrested and charged only with immigration violations. And that was back in December of 2005. At the time that he was originally taken into custody, we didn't receive any of the information regarding these offenses. Other people were able to look at reports and begin to make decisions, and we were not -- although I think there was a suspicion that something might come along, we were not even sure and I was not being told at that time whether he would ever be incorporated into this particular offense.

At that stage in the case, and I am -- my memory is that this preceded the filing of the superseding indictment in the case, which was the first time he was actually charged, but it may have come right around that period of time, I learned that, in fact, Chelsea Gerlach was going to be cooperating with the government.

And to understand my client's character, I think it's important to repeat to the court, I was concerned when I went in and told him that. And I think it's important to repeat to the court what he said to me at that time, and

that was he simply asked me to attempt to communicate to her lawyer that he understood what she was doing, that it did not cause a problem to him, meaning it didn't upset him that she was doing it, not that it wasn't going to cause problems for him, and that he encouraged her to go forward with it, despite the fact that there might be some detrimental effect to him.

So as a first part of my client's character, and I think it's reflected in how the government treated him and it's reflected in terms of the way his peers have treated him, is he is a person who has not run away from personal responsibility. He's not a person who has attempted to use or influence another person, especially in this case, to his benefit.

Now, ultimately, we were approached regarding the conference that Mr. Weinerman mentioned or Mr. Ehlers mentioned. I can't remember exactly which one. I guess it was Mr. Weinerman meeting with Chelsea Gerlach at the U.S. Attorney's Office.

At the time that my client agreed to that meeting, we had still not received any discovery related to the Litchfield incident. We had at that point begun to receive discovery, but nothing regarding the offense that he was involved in.

I prevailed upon Mr. Engdall to provide me with a

few reports because of the decision we were facing and choices we were going to have to make, and he did. He gave me four reports of witnesses talking about the Litchfield incident, all of them redacted to disguise or at least make it difficult to figure out who it was who was speaking. And the instructions I had was that I could read them so that I could advise my client, but I was not allowed to provide them to him or discuss them with him.

So at the time that Mr. Thurston went into this meeting with Chelsea Gerlach to talk about cooperation with the government and accepting a plea offer in the future, he went in virtually blind as to the nature of any of the information that the government had against him.

There's no question that she was persuasive, and I think you probably have a good idea from the way she spoke on Friday how articulate she is and how persuasive she is. But I believe it's worth pointing out that if my client was not predisposed to resolve his case at that time, he never would have had that meeting with her. He knew what the meeting was about. He knew what she was going to say to him. And he was moving in that direction at the time that he walked into the meeting to talk with her.

What about that meeting stays in my mind more than anything is the degree of emotion that was involved. I was present when the comment attributed to Mr. Peifer was made,

and I agree. There was -- my comment to my investigator when I walked out was I could have spent an extra year trying to humanize my client for the prosecutors, and I couldn't have accomplished anywhere near as much as what took place in that room in one or two hours that we were all sitting there.

My client sat on one side of the table and Ms. Gerlach sat on the other. They were not allowed to have any private conversation. They were allowed at one point during that meeting to touch hands. And I remember seeing them there talking. I don't recall the conversation -- certainly the excerpts that -- that Mr. Weinerman read to the court were -- although they sound familiar from the meeting, were a minor part of what went on there.

And the reason I go back to them is in the back of my mind, I have this sense that having heard those excerpts, in some way Mr. Thurston's ultimate decision to resolve his case here is somewhat diminished by the fact that Chelsea Gerlach had said to him before he made that decision, this is what I'm doing. And I would just hope that the court would not -- as you mentioned, each person comes to these decisions, requires different types of information, different decision-making process. And I would hope that the fact that Chelsea was urging Mr. Thurston to do this doesn't take away from the decision that he made.

Clearly at the time she was further along in the process than he was, and she very much assisted him in making up his mind as to how to proceed, but he was already going in that direction.

And I think ultimately the image that I take away from it was two people saying good-bye to each other, because given their nationalities, it is extremely unlikely they will be able to meet in this country or Mr. Thurston's country because she can't go there and he can no longer, once he's removed to Canada, come here. So there was that recognition.

But more importantly, they were saying good-bye to the people they had known each other as, because each one of them was moving forward in a way that was going to drastically change who they were. Neither one of them was going to be the person they were last with on the day that they were arrested in December of 2005. And from talking to my client and just from my own intuition about Ms. Gerlach, each one took strength from knowing that, as they embarked upon this change, that the other understood, agreed, and encouraged them to follow through with what they were doing.

And things moved very quickly once that meeting had occurred. It wasn't long after that that my client indicated to the government that, in fact, he was willing to resolve his case through negotiation and that he was, in

fact, willing to cooperate.

And to show you or to point out to you how drastic a change that was in his life and how far he had come, we have heard a long litany of incidents that he was involved in provided by the government, actually provided by Mr. Thurston to the government and then provided to the court. And some of those incidents had involved his arrest and prosecution in Canada where he didn't cooperate, where he basically stonewalled the government, where he followed up by encouraging other people not to participate that way. And what those incidents point out to me more than anything is just how far he has come this time around.

He can no longer -- first of all, he doesn't want to participate any longer in the ELF, the ALF, or that type of radical activism.

Secondly, he has severed his ties in such a way that even at this point if he wanted to in any way reintegrate or reparticipate with persons who are involved in those activities, he would simply not be welcome. I'm sure other people -- that you are aware from what other people have mentioned, the alternative press in Eugene and nationally has not been kind to the people who were perceived to have been cooperators.

So my client has -- has cut the ties, is moving on, and despite the role that has been attributed to him of

a senior statesman within that organization, he has now withdrawn and resigned from and will have no further involvement in any way in their activities.

And what's lost in the focus on his -- and unfortunately, he did this to himself. But what's lost in the focus on his unlawful activities is much knowledge or reference or consideration of his lawful activities during the time that he has been an activist. He's going to talk more about this, but I would also just point out that in -- during the time -- that period that the government talked about, he was also involved in a Canadian wildlife organization called Bear Watch which involved maintaining secure habitats for the Canadian bear population. He worked for them for a number of years. He was involved in an organization that provided computer training for underprivileged children in the Vancouver, B.C. community. And he was also involved in an organization called the B.C. Compassion Club, which provides counseling and alternative medicine to chronically and terminally ill people in the Vancouver community.

So while he's been in custody, he's used his time wisely. As you have seen from the letters that were sent by supporters of his, he has been thinking about vocation, he has been thinking about going back to school and completing his education, and he has been focusing on the more

mainstream activities like I just mentioned, with a recognition that he has taken something from society during his unlawful activities, and that he now has an obligation to return to society an amount equivalent to that which he has withdrawn.

He is looking forward to being able to return to his community in Canada. He, as cited in the letters, is recognized as being a caring and compassionate person, and in reviewing those letters, I observed one that I thought -- I just wanted to refer the court to one paragraph of it because I think that it describes Mr. Thurston more accurately and effectively than I have just attempted to do in the entire time I have been talking.

And this is written by a friend of his named Elaine Budlong who has visited Mr. Thurston on virtually a weekly basis during the time that he's been in custody in Portland.

> "During my visits with Darren, we talk about everyday issues as well as dealing with hard issues like processing the emotions he has with the acknowledgment that he has left the radical portion of the animal rights and environmental movement. Darren accepts my teasing about his past very good-naturedly and is able to recognize the extremity of the lifestyle he chose to live.

We have discussed growing older and recognizing the world is not as black and white as we had both once thought and how that consequently demands a more enlightened approach to dealing with differences of lifestyle.

"He is no longer feeling the need to carry the weight of the world on his shoulders and wants to enjoy the freedom of living life without the stress, pressure, and fear that exhausted him during the past."

As I mentioned in my sentencing letter to the court, we have felt exceptionally fairly treated by the government during the course of these proceedings.

I was going to ask the court to sentence Mr. Thurston without the effects of the terrorism enhancement, and I was going to mention where that left him in the guidelines. I think given the court's comments earlier, I can only think of a quote that I regularly attribute to Judge Ashmanskas in Portland where he has offered me the opportunity to steal victory from the jaws of defeat.

We have always thought that the sentence was fair, and I wish I could argue for less and feel like I was being intellectually honest, but I think Mr. Thurston will walk out of here feeling that he has been treated with the utmost

of respect if the court imposes a sentence that was negotiated for him, and we ask you to do that.

THE COURT: Thank you. I'd like to take just a couple minutes because I -- I think about these guideline calculations, really no fun right now, because that's what I think about, and how this affects each and every case, and I'd just like to take a minute to look at what I had done in my own analysis and make sure I have covered everything I needed. I have read the case that you provided the court this morning, so I have looked at that. But I just wanted to have everybody's arguments and go back and look at my analysis, and then I will ask Mr. Thurston for his comments.

All right?

MR. PEIFER: Can I just make a couple points, Your Honor?

THE COURT: Sure.

MR. PEIFER: The *Kimler* case was a jury trial. There was no plea agreement in that case. There was no attempt to limit the guidelines application to a single book. So in *Kimler*, the court had a true situation we would have had here if we had had no agreement.

And of course, our position is the agreement trumps the provision that would take it into another book.

As far as the fire itself, it's true that the one barn burned, but there was an attempt to burn other

buildings, and they failed. Ms. Kolar literally got her wires crossed on her device and it didn't work, and so the fire could have been more extensive. He wasn't involved in that part, but I wanted to set that straight too.

THE COURT: Thank you. We'll take a 15 or 20-minute recess.

THE CLERK: Court is in recess for 20 minutes.

(Recess.)

THE COURT: Thank you. Please be seated.

Mr. Thurston, you have had a chance to read the presentence report; is that correct?

THE DEFENDANT: Yes, I have. That's correct.

THE COURT: And have you had plenty of time to talk it over with your lawyer?

THE DEFENDANT: Yes, I have.

THE COURT: Any additions or corrections you want to call the court's attention to?

THE DEFENDANT: Nothing at this time.

THE COURT: This would be the time.

THE DEFENDANT: Yeah. Nothing.

THE COURT: Anything you want to say before I impose the sentence in this case?

THE DEFENDANT: Yes, I do.

At earlier sentencings I have heard Judge Aiken use the phrase actions speak louder than words. This is a

phrase I'm very familiar with. In fact, it is the motto I have strived to live my life by for almost 20 years. You are not going to hear me blame anyone else for my actions. I accept full responsibility for and have many regrets about my actions in this crime.

I have long considered that all life is sacred and have a very strong personal commitment to nonviolence. When I agreed to participate, I truly believed the crime at Litchfield would only entail the release of wild horses to their native habitat. After I learned otherwise, I made the decision to continue on with this crime and only take part in releasing the horses. I realize I assisted with the entire crime and am entirely responsible for it. I also understand the very real danger this crime may have had to firefighters or other emergency personnel.

My actions in this case have effectively resigned me from further involvement with the Animal Liberation Front or Earth Liberation Front. I have no intention of being involved in actions of this kind in the future.

This case has focused attention upon my activities as a activist, but my life's experiences are actually much broader than that. Some of the work I have done includes program leadership for young children. I have campaigned against dolphins in captivity. I have been a librarian. I have campaigned against fur farms. I have managed retail

stores. I have campaigned against trophy hunting and poaching of endangered grizzly bears.

(Reporter interrupted.)

THE DEFENDANT: I have campaigned against trophy hunting and against poaching of endangered grizzly bears and against bear farming and the bear parts trade. I have worked in print and radio advertising. I fought clear-cutting in old growth forests. I have managed small offices. I have supported First Nations and their claims to sovereignty. I have campaigned against racism and bigotry and against recruiting by the Aryan Nations and the Ku Klux Klan.

(Reporter interrupted.)

THE DEFENDANT: I have campaigned against racism and bigotry and against recruiting by the Aryan Nations and the Ku Klux Klan.

THE COURT: When you read -- when anyone reads, you read faster, and it's hard on the court reporter, and when you are nervous, it seems to speed up. So just take a deep breath and read carefully.

THE DEFENDANT: I have worked with the poor and terminally ill.

I sincerely regret that my actions in matters like this case have so diminished the positive activities I have otherwise been involved in. I continue to have passionate

views about social and environmental justice, but I have realized several years ago that my actions need to take a more peaceful, constructive approach.

Upon my release from prison, I plan to continue my work for those that are less fortunate than me.

I want to apologize to my friends and family for the sorrow and disappointment I put them through, especially my mother and grandmother, who I put through untold amounts of pain.

(Reporter interrupted.)

THE DEFENDANT: Who I put through untold amounts of pain with my actions and subsequent imprisonment.

My mother and grandmother have been -- have made the long trip to Portland from Canada twice in the past 17 months, which I deeply appreciate.

They are not here today because I have asked them not to attend my sentencing, as I don't feel I need to submit them to any further suffering.

(Reporter interrupted.)

THE DEFENDANT: I asked them not to attend my sentencing, as I don't feel I need to submit them to any further suffering.

I have several other close friends who have traveled here from Canada who, along with my family, I would like to thank deeply for their support. They have been

there for me since my arrest and will be there for me during my prison time and upon my release into my community in Canada.

You have my deepest gratitude. Thank you.

THE COURT: You know, Mr. Thurston, I made my statement early on as a way to telegraph to your lawyer that, really, his words weren't going to change my analysis in terms of how this case has been resolved. And I would honor the analysis and honor the agreed upon resolution of this particular case.

And the reason that I said that has nothing to do with, you know, any ease of doing this sentencing. In many ways, this is a difficult sentencing because, clearly, in reading reports about you, you are extraordinarily gifted and bright. And you have squandered that in so many ways by not pursuing a different course of action and not understanding the impact as a leader you could have on so many people's lives. And you kept getting sidetracked, lured to do activities that really don't, in the bigger scheme of things, really lead to a conclusion that you have impacted the world in a way in which you really truly could have if you pursued your education. Because you come from a very loving and supportive family, and although there were difficult times, you had individuals who cared about you. You were very talented and gifted, and you did not pursue

education to the extent that I think would have given you much more flexible thinking as opposed to the concrete thinking that's demonstrated by these black-and-white actions.

And I think the letter -- it was the letter that struck me as well that the letter sort of talks about your intellectual development and understanding that the world is much more complicated and there are much more -- there's much more context in terms of how you have to operate and make decisions and work within a social body.

And then again, I have to indicate, you are a Canadian. You are here. Why are you here causing problems for our government? Don't you have some issues in Canada to resolve? Weren't you working up there? Why did you come here and just start problems?

Take care of your own place first. You have issues up there. Resolve your issues and be a lawful, law abiding individual, Canadian making a difference in how issues are shaped and formed. Don't be coming down here and causing problems in our neck of the woods.

In fact, why I think it's a sentence that I'm going to honor but I'm kind of surprised about is I can't tell you how many illegal reentry cases where people have come in here and committed, you know, drug offenses, and they are not only going to serve a longer period of time and

then they are going to be deported to Mexico where their opportunities are way less significant than your opportunities in Canada for success and an economy and a way to participate.

So I hope what you get out of this sentencing today and what you tell your mother and your grandmother is you get a chance to do over. And by doing over means doing right by people.

So because you probably didn't study American history, American constitutional law, civil rights and civil liberties, but you just decided your own code of the group of people you participate in, I want to read to you from a biography of an activist who understood what it meant to be an activist in the American system of governance, because democracy is a very complicated set of systems. But it was formed and organized with checks and balances on the three branches of government. And I note and read widely. You know, there's been a comment that your behaviors were very similar to the Boston Tea Party. And I thought, well, there you go. Ignorance. The cry in the Boston Tea Party was taxation without representation.

For all the activists involved in this activity, you all had a chance to participate in representative governance and coming in and fighting a good fight, whether it's at a city council level or there's just voting, you

know, Congress, you know, legislative jobs, you know, working within an administration, getting a legal education, understanding the principles that really did put this country together.

But nobody bothered to look at that complexity and that ability to effect change. It was instant gratification. And some day I hope people understand that instant gratification has caused so many difficulties for all of us. We don't have the ability to sustain any efforts longer than the moment to get what we need and want.

So to get what you need and want for you was to take action, make your own decisions, be, basically, you know, prosecutor, judge, and jury to make the conclusion fit your framework of what is right.

So this is just a quote from what I would tell you -- just a -- I think ironically, an appropriate title, *A Defiant Life: Thurgood Marshall and the Persistence of Racism in America*. Quoting on the 381st page in the chapter called "Always The Outsider, Always Defiant," I'm just going to read you one paragraph that sort of sums up this activist's view, Thurgood Marshall's view of activism.

> "Law is a series of rules made, modified, discarded, and remade by legislators, judges, and others, Marshall insisted throughout his life as an advocate and as a jurist. If the law is too

unfair or too exclusive or too insensitive and unrepresentative to the needs of some people living in society, it can be challenged by them with the help of lawyers.

"'The rules is the rules' principle Marshall absorbed at Howard Law School, and it was confirmed by his practical legal experiences with Charles Houston in the 1930s. But Marshall, as the leader of a successful civil rights legal organization for three decades, understood that rules can be changed and that the tasks of lawyers is to use the law to change the bad ones. Hard work and patience were essential to success."

Now, while you were out releasing animals, Justice Marshall saw as his job to release human beings. He used the rule of law. He used the forms of government that were carefully crafted for a check and balance.

So when you come back to this country, should you ever be allowed back into this country, understand that change is through the rule of law, not the actions of a few people who think they hold the key to all knowledge. It's more complicated than that. And if you'd stayed in school long enough, you'd have understood the complexities and you'd have been challenged to a meaningful participation in helping the world see the views that you feel so strongly,

because ironically, I will bet if you took a survey in this room, every single person here probably feels as strongly about caring for humans and animals as you do. But their approach is to raise and address those issues lawfully.

So do you understand?

THE DEFENDANT: Yes.

THE COURT: And I hold you today accountable for your criminal activity up to and including the last activities.

And I do, again, because the job I hold, I do believe people can change and make a difference and come back and pay back society. And you have a lot to pay back. A great deal to contribute to either knowledge or to other human beings so that they respect the choices that you are to make.

And I -- I think it's truly tragic that anyone would hold you up as anything but a courageous person, because in your life, it's very difficult sometimes to find out who your friends are. Right? It's very difficult. But it's never a bad thing. In the end, the people who truly care about you, about you, will be there for you. The others who tend to use people and who move on because you don't fit their narrow framework, can find other people.

So stand by the people who find you to be a worthy human being, and your letters demonstrated that you have any

number of people who believe in you and see a brighter future, and understand that those that you left behind by the decisions you are making -- your lawyer, I understood that meeting, and I -- people make their own decisions and people come to their own decisions through lots of different processes. And I don't hold it against anybody. Some people have a quicker frame of reference and can walk through that decision-making process one way, and others take in information, process it differently, and have to walk through their own set of decision makings to get there.

I do think the ability to have the communication and everybody understand that they were going to move on and they were going to let go of this, you know, terrible secret. Family secrets destroy families. This is just the same. It's a different context. But all your secrets were destroying you anyway.

So that meeting was pivotal in many ways to Ms. Gerlach's need to go forward. It may well have helped you, pushed you a little further down the way.

I also recognize, as your lawyer indicated, that it was a chance to say good-bye on a number of levels, on a number of levels. And I only hope that you support each other in your positive lifestyles down the road to the extent you can, because that's going to be important because people you thought were your friends, just as the folks when

I do sentencings in a drug case, their buddies aren't here either. Okay?

So leave your world behind. You have lots of time to make up the difference and to contribute either by working with animals in an appropriate fashion, working with other education programs that you care about, getting a true education and understanding where you can make a difference and perhaps even understanding, by taking some American history and U.S. government, why the frames of reference today have all to do with battles long fought and honored and traditions that we uphold because, in the scheme of things, the three branches of government still is the best model to preserve and protect society as well as the individual. It may not be perfect, but it still is the best model.

So accordingly, I looked at the guidelines calculations to your offenses and make the following findings:

Case No. 6 -- 06-60069, Count 1, conspiracy.

Pursuant to 3D1.2, your conspiracy is grouped with the underlying substantive offense. Accordingly, the conspiracy count then is grouped with the offenses below.

Case No. 60-60120 [sic], Count 1, the BLM Litchfield wild horse facility.

The base offense level for this offense is 20.

Based on the recommendation of the probation office, I also find a two-level downward adjustment for minimal role. I decline to find that the defendant's role warrants a further two-level downward adjustment given the totality of your involvement.

Further, I find that the offense was calculated to influence, affect, or retaliate against government conduct, as evidenced by the communique issued afterwards describing the arson and horse release as efforts to stop the BLM's quote, illegal and immoral, unquote, practice of rounding up wild horses that eventually ended up in the slaughterhouse.

The question remains whether this court can consider this offense a violation of § 844(f)(1), a federal crime of terrorism, in light of the Patriot Act's 2001 amendment, requiring that arson of government property must include a substantial risk of harm or death before it may be considered as a federal crime of terrorism.

It is difficult to find that there was a substantial risk of harm because of the remoteness of the corral. Thus, the sole issue is whether the 2001 amendments apply to this offense, even though the offense was -- the offense conduct was completed prior to the amendments.

I have been unable, given the time constraints of last week, to conclusively resolve this issue after conducting a significant amount of research, particularly in

the context of grouped offenses and the slight overlap between the effective date of the Patriot Act and the 2000 version of the guidelines.

Under the circumstances, I will err on the side of the defendant and decline to impose the enhancement based on the uncertainty of whether defendant's offense of conviction is identified by statute as, quote, a federal crime of terrorism.

Ultimately, however, it does not affect my sentencing decision. I have the discretion to depart where the guidelines do not adequately take into account aggravating circumstances of the offense conduct. Here, the communique issued after this offense stated that the arson was, quote, in opposition to the Bureau of Land Management's wild horse holding facility and the BLM's action of rounding up thousands of wild horses and burros to clear public lands for grazing cattle. The communique warned, "In the name of all that is wild, we will continue to target industries and organizations that seek to profit by destroying the earth."

Therefore, Subsection 3A1.4 does not adequately take into account defendant's intent to frighten, intimidate, and coerce government conduct and retaliate against government conduct. I exercise my discretion under 5K2.0 to depart upward by 12 levels, resulting in a base offense level of 30, which is the resulting offense level

had the enhancement applied.

Acceptance of responsibility.

Based on the agreement of the parties, defendant will receive a three-level downward adjustment for acceptance of responsibility, resulting in an adjustment -- in an adjusted offense level of 27.

Criminal history category.

The defendant has 0 criminal history points, resulting in a criminal history category of I. However, under 3A1.4, defendant's criminal history category is established at VI.

The resulting guidelines range with an offense level of 27 and a criminal history score of VI is 130 to 162 months.

The government's motion for substantial assistance, then.

MR. PEIFER: Yes, Your Honor. We ask the court to depart downward 13 levels to level 14 with category VI. That would be 37 to 46 months, and we ask for a 37-month sentence.

THE COURT: Thank you.

MR. FEINER: Judge, I would wait until you were done, but I wonder if it wouldn't be more appropriate to bring this to your attention right now.

Unless I'm missing something, if the terrorism

enhancement isn't imposed, his criminal history category would be I, not VI.

THE COURT: Oh, good point. What's the range then?

MR. PEIFER: 70 to --

MR. FEINER: It would be level 27, 70 to 87.

THE COURT: 70 to 87.

MR. PEIFER: So that would require just a six-level downward departure.

THE COURT: Is that right, Mr. Purdue? Would you double-check that?

MR. PURDUE: Level 21.

THE COURT: Your motion, then, Mr. Peifer, just so I have it clearly for the record, if his criminal history category now is a I, the guidelines range at 27 for the offense level, and I for the criminal history is 70 to 87 months.

Your motion.

MR. PEIFER: We would move for a downward departure of six levels to offense level 21, category I, which would be 37 to 46 months, again, asking for a 37-month sentence.

THE COURT: That motion will be allowed.

Downward departures.

Although, as in the previous cases, I have the

discretion to increase the departure for substantial assistance or depart downward for other reasons or depart upward for other reasons, I'm declining to do so in this case. The departure of the government more than adequately recognizes your cooperation, and in fact, I question -- I have my -- I have my own analysis about perhaps what this sentence might have been had you not been part of the overall plea agreement, given the unique nature of your criminal history, your own additional contacts, both here and in Canada, with the law, as well as what I believe to be your incredible intelligence and your ability to have understood the nature and consequences of these acts.

So all said and done, I think on balance, in order to underscore and support the resolution of these cases, I will follow the recommendation and hope that you are one of the individuals in this case that goes on to appreciate and live life knowing that you are given more opportunity to do things that will make a positive difference in the world than the incredible destruction that you caused.

Therefore, with regard to -- so I have taken a look at the advisory guidelines range. I have also considered the factors in 18 U.S.C. § 3553, which I have addressed those unique circumstances of your own. I have also looked at the obligations of sentencing, punishment, deterrence, rehabilitation, community safety, and noted

that -- the importance of maintaining the plea agreement in this particular case.

All that being said, with regard to Case 06-60069, Count 1, you are committed to the Bureau of Prisons for confinement for a period of 37 months.

With regard to Case 06-60120, you are committed to the Bureau of Prisons for confinement for a period of 37 months, to be served concurrently with the sentence imposed in 6 -- 06-60069.

Next, you shall pay full restitution to the victim identified in the presentence report in the amount of $122,497.60, jointly and severally with Joseph Dibee, and your interest shall be waived. Dibee, Dibee. Is it Dibee or Dibee?

THE DEFENDANT: Dibee.

THE COURT: Dibee. Upon release from confinement, you will serve a three-year term of supervised release, subject to the standard conditions of supervision adopted by this court and upon the following special conditions:

First, you shall cooperate in the collection of DNA as directed by your probation officer, if required by law.

Next, you shall pay full restitution to the victim identified in the presentence report in the amount of $122,497.60, jointly and severally with Mr. Dibee in Case

06-60011.

If there is any unpaid balance at the time of your release from custody, it should be paid at the maximum installment possible and not less than $200 a month. That amount will be negotiated when you are released and once you are employed, and the probation officer will have the ability to provide whether or not you are working in your full capacity to pay the restitution, because this obligation will continue for some time.

If deported, you shall not enter the United States without the approval of the Department of Homeland Security and without prior notification to the U.S. attorney and the U.S. probation office for the District of Oregon.

I'm not -- I'm also going to say -- it goes without saying, but you are not to commit any new federal law violations, whether they are state, federal, or local violations.

I'm not imposing a fine. I'm making the finding you don't have financial resources nor an appreciable earning ability to pay the fine, and you have a substantial restitution obligation which will be your first obligation.

However, you are required to pay the fee assessment in the amount of $200.

You entered into this plea agreement waiving all or part of your appeal rights. If you wish to file a notice

of appeal, you may do so. It must be done within ten days of this date. If you can't afford to do so, contact the clerk's office. It will be done for you and done for free.

Other recommendations, counsel.

MR. FEINER: Your Honor, we would ask for an initial designation to FDC SeaTac. However, we are concerned that this sentence might not be one that can be served there just because of its term.

So if that is not possible, then we would ask that the designation be to Sheridan, and it would have to be the prison there, not the camp, because as a resident of Canada, he would not be eligible for the camp.

THE COURT: We will include those recommendations in the order.

And did I miss anything, counsel?

MR. PEIFER: No, Your Honor.

THE COURT: Anything else to be dismissed?

MR. PEIFER: He's charged in the superseding indictment, so we'd ask that he be dismissed as far as that indictment is concerned.

(Counsel conferred.)

MR. PEIFER: The Portland case, he just mentioned, is before Judge King, and I can simply submit a dismissal order before him or we could do it here too as a part of the plea agreement.

THE COURT: We can just do it as part of the plea agreement.

MR. PEIFER: Thank you.

THE COURT: And then it's one set of paperwork --

MR. PEIFER: Right.

THE COURT: -- and nobody has to be responsible for it.

Anything else?

MR. FEINER: Nothing, Your Honor. Thank you.

THE COURT: Good luck.

THE CLERK: Court is in recess.

(The proceedings were concluded this 29th day of May, 2007.)

I hereby certify that the foregoing is a true and correct transcript of the oral proceedings had in the above-entitled matter, to the best of my skill and ability, dated this 17TH day of August, 2007.

Kristi L. Anderson, Certified Realtime Reporter